

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 98-0028 ST

Tax Administration — Negligence Penalty

For Tax Periods: 1991 Through 1994

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ISSUE

I. Tax Administration — Negligence Penalty

Authority: IC 6-8.1-10-2.1

45 IAC 15-11-2

45 IAC 2.2-3-20

Taxpayer protests the imposition of a ten-percent (10%) negligence penalty.

STATEMENT OF FACTS

The taxpayer, an Indiana corporation domiciled in Indiana, is the parent corporation for several subsidiaries that are engaged primarily in the health care profession. During the audit period, the taxpayer purchased various items without paying the appropriate sales tax at the time of purchase. The taxpayer did not self-assess use tax on any of these items.

Upon audit, the taxpayer was found to have incurred a use tax liability. The taxpayer has accepted the proposed use tax assessments, but protests the imposition of the negligence penalty.

II. Tax Administration — Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten-percent (10%) penalty. The negligence penalty imposed under IC 6-8.1-10-2.1(e) may be waived by the Department where reasonable cause for the deficiency has been shown by the taxpayer. Specifically:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-2.1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. 45 IAC 15-11-2(e).

The taxpayer argues that the use tax deficiencies were due to reasonable cause. The taxpayer states that it relied on its vendors to charge the applicable sales tax. Taxpayer reasons that since the responsibility for determining the taxability of a transaction resided with the vendor, and that the taxpayer did not provide its vendors with exemption certificates, the fault necessarily lies with its vendors.

However, Regulation 45 IAC 2.2-3-20 explicitly states:

All purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax. The use tax must be collected by the seller if he is a retail merchant or if he has Departmental permission to collect the tax. If the seller is not required to collect the tax *or fails to collect the tax when required to do so, the purchaser must remit the use tax directly to the Indiana Department of Revenue.* (Emphasis added.)

In the alternative, taxpayer suggests that much of the tax liability was due to human error. Taxpayer pointed out that there was a natural time lag between the audit period and the implementation of change, as the audits are often retroactive.

However, the taxpayer has been audited in prior years. The nonpayment of use tax has been at issue in two previous audits – February 1987 and December 1991. In each of the past audits, the taxpayer has incurred additional use tax liabilities. By the time this audit commenced in May 1995, the taxpayer had had ample opportunity to implement policies and procedures to assure compliance with the Indiana use tax statutes.

The taxpayer concludes by observing that many of the transactions in question involved a particular subsidiary. Taxpayer, in good faith, argues that since this particular subsidiary *had not been a party to the prior audits*, audits where the taxpayer had incurred additional use tax liabilities, the subsidiary's transgressions should not be subject to a negligence penalty. However, upon review of the Department's archived records, the Department discovered that *this particular subsidiary had, in fact, been included in the taxpayer's prior audit.*

Since the taxpayer has had prior notice of this problem and has failed to take corrective actions, the Department concludes that the taxpayer has not exercised ordinary business care and prudence. Taxpayer, therefore, has not established the necessary reasonable cause to waive the penalty.

FINDING

The taxpayer's protest is denied. The negligence penalty is appropriate.